No. 89-206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MEBA PENSION TRUST, *et al.*
Petitioners,

v.

JUAN RODRIGUEZ, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT [1]

I. The Intercircuit Conflict As To The Applicability Of ERISA

A. Given the Fourth Circuit's express acknowledgment that its construction of § 514(b)(1), 29 U.S.C. § 1144(b)(1), of ERISA is in direct conflict with the construction placed on that provision by the First and Ninth Circuits (A. 6), it is not surprising that Respondents' Brief in Opposition attempts to recast the lower court's holding. Respondents assert that this case does not present the is-

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[1] Throughout this Reply, "Pet." will refer to the Petition for a Writ of Certiorari. "A." will refer to the Appendix to the Petition, and "Resp. Br." will refer to the Respondents' Brief in Opposition.

sue on which the Circuits have split—whether a district court may assert jurisdiction under ERISA and apply ERISA's substantive stnadards to adjudicate a claim based on a post-ERISA denial of benefits where that claim is the "inevitable result of unequivocal pre-effective date interpretations." A. 6, quoting *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir. 1984), and *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838, 841 (1st Cir. 1981).

Respondents contend that this case is unlike *Menhorn* and *Quinn* in that "[i]n this case, *almost every significant act or omission occurred post-ERISA*" and list six post-ERISA events which they view as "significant." Resp. Br. 11, emphasis in original. Respondents' theory is wholly incompatible with the Court of Appeals' explanation of its decision to assert ERISA jurisdiction, notwithstanding § 514. A. 5-7. The Court did not distinguish *Menhorn* and *Quinn*, or even advert to the passage in *Menhorn* which Respondent quotes. Rather, the Court recognized that those decisions represent one of "two competing views" (A. 6), of which the Court chose the opposing "approach" of the Third Circuit. *Id.* The *only* post-ERISA event relied upon by the Court of Appeals to assert jurisdiction is the denial of claimed benefits in 1986. This fact does not differentiate the present case from *Menhorn* and *Quinn*, which also involved post-ERISA benefit denials. The Court of Appeals reasoned that the "Third Circuit approach has the advantage of certainty [because courts] need only look to the date of the trustee's determination to decide whether ERISA applies" (*id.*), and further, that the "act of denying a claim will inevitably involve a post-ERISA interpretation of the plan" (A. 7). Respondents' contention (by thrice listing the 1986 denial) that jurisdiction attached *because of the grounds stated* by the Trust is wholly inconsistent with the Court of Appeals' straightforward (though we submit erroneous) approach, and would introduce ambiguity whereas the Court sought "certainty."

The only other listed post-ERISA item which the Court mentioned is that in 1975 and 1976 two port engineers were given the opportunity to retroactively exercise their option. There is no basis for the assertion (Resp. Br. 12) that "[t]he Court of Appeals found these acts significant." On the contrary, the Court did not even mention them in its statement of the case (A. 2-4) or in its discussion of the jurisdictional issue. Again, that discussion would have been entirely different if it had been the Court's view that the events in 1975 and 1976 constitute an independent basis for liability.[2] Respondents' items (4) and (6) are not even referred to in the Court of Appeals' opinion.

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[2] Further evidence that these events were not deemed significant is that the Court of Appeals did not address the District Court's conclusion that the Trust properly differentiated those two individuals. As the District Court noted, Rodriguez' course of conduct is readily distinguishable from that followed by other beneficiaries who, like Rodriguez, did not receive notice of the option in 1969, because they sought to retroactively exercise their option "both soon after they learned of the option or many years in advance of retirement." A. 22. Rodriguez, by contrast, waited over twelve years to inform the Trust what he knew in 1973, *i.e.*, that he failed to receive the original notice of the option in 1969. As the District Court explained, it was this knowing delay in seeking a retroactive option that potentially would permit Rodriguez to have the best of both worlds:

> At the time he would have been exercising his option, the decision to forego current pension benefits was not so clear. It was a bet that he would not survive for a sufficient period of time to receive greater benefits by exercising the option. Now, at this point in time, he seeks to recompute the benefits in his favor with hindsight, since he has in fact survived this period of time and is about to retire. This situation was distinguishable from those of the other beneficiaries, and for this reason, this Court finds that the decision of the Trustees did have a rational and sound basis and was not arbitrary and capricious. [A. 22-23.]

B. In discussing the other aspect of the first question presented by the Petition, Respondents' distortion of the Court of Appeals' opinion is complete. They assert that "this is not a case in which post-ERISA standards are applied to pre-ERISA conduct in any way, shape, or form." Resp. Br. 13. This statement sweeps aside the Court of Appeals' reliance on the nondelivery of the 1969 letter to plaintiff and on the Trust's 1973 response to his inquiry as to whether he was eligible to receive additional benefits. A. 9-10. Moreover, Respondent provides no answer to the inevitable question: "If the Court of Appeals was not applying ERISA standards, what standards did it apply?" The Court plainly did not rely on pre-existing state law.[3] And while the Court's opinion creates uncertainties as to whether its discussion of § 302(c)(5) of the Taft-Hartley Act and decisions thereunder (A. 8) was used merely as an aid to interpret ERISA standards, or was treated as a separate basis for liability for pre-ERISA acts (Pet. 11), Respondents steadfastly disclaim that §§ 301 and 302 of the Taft-Hartley have anything to do with the case. Resp. Br. 13. They apparently take this tack in order to avoid acknowledging the conflict in the Circuits as to the meaning of § 302(c)(5). See Pet. 11-13.[4]

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[3] State law was mentioned by the Court of Appeals only in a footnote. A. 7 n.1. That discussion was limited to an acknowledgment that the District Court had dismissed Respondents' state law claims as time barred and a finding that the opposite conclusion should be reached with respect to Respondents' ERISA claims. *Id.*

[4] Respondents further obfuscate matters when they refer to "the jurisdictional issue discussed at length (pp. 11-13) as to whether or not § 302(c)(5) of the Labor Management Relations Act can provide an independent basis of jurisdiction in this case." Resp. Br. 13. As is entirely clear, the Petition was there addressing the question of substantive standards, rather than jurisdiction.

We note also that Respondents say, perhaps inadvertently, that "§§ 301 and 302 were cited by petitioner * * *." *Id.* These provisions were cited by plaintiffs (Respondents).

II. The Conflict With This Court's Limitations Decisions

1. Respondents also assert that the Fourth Circuit's conclusion that their claim is not time-barred does not merit review because that conclusion was based on a uniform construction of ERISA, *viz.*, that a cause of action for denial of benefits accrues upon formal denial of a benefit claim. Resp. Br. 13-14. This simply does not meet the issue raised in the Petition, pp. 15-18.

There is no doubt that, to the extent Respondents claim that the Trust's 1986 determination was improper because it rested on an erroneous construction of the Trust's regulations, their cause of action accrued upon the denial of benefits and the statute of limitations began to run on that date. That, however, is not the claim addressed by the Fourth Circuit, which found the 1986 determination to be in error *only* because it found an earlier event (the Trust's failure to give notice in 1969) to be improper. In that circumstance, the authorities set forth at pages 15-17 of the Petition establish that Respondents' claim is timely only if the earlier event is within the limitations period.

In this respect, the instant case is indistinguishable from *Machinists* v. *National Labor Relations Board*, 362 U.S. 411 (1960). In *Machinists*, an employee was discharged for failure to comply with a union security clause of a collective bargaining agreement. The Labor Board complained (on behalf of the employee) that the discharge was unlawful, not because of the language of the union security clause or the manner in which it was applied to him, but on the allegation that the clause had been illegally *adopted* outside the limitations period. Obviously, the employee's claim for wrongful discharge did not "accrue" until the time of his discharge. Nonetheless, this court reasoned that a discharge that was "otherwise lawful" could not be challenged on the basis of an earlier event "where a complaint based on that earlier event is

time-barred." *Id.* at 417. As Justice Harlan explained, a contrary holding "would withdraw virtually all limitations protection from collective bargaining agreements attacked on the ground asserted here." *Id.* at 425. So, too, under ERISA, if the statute of limitations does not begin to run until an employee's claim for benefits is rejected, even though validity of the claim depends on the legality of events outside the limitations period, claims based on earlier events (such as alleged failures to provide notice) would continue to have legal consequences long after the event. Respondents do not even attempt to reconcile this result with the policy of repose embodied in every statute of limitations. See Pet. 17-18.

Instead, Respondents recur to the basic theme of their argument, saying: "There was no determination of an 'illegal' pre-ERISA act or omission, no violation of a federal statute, nor anything remotely similar." Resp. Br. 15. According to Respondents, the 1969 failure to give notice, and the 1973 letter which stated that Rodriguez no longer had an option, "were found to constitute *fiduciary mistakes*, they were not held to be 'illegal' in any sense." *Id.*, emphasis added. Respondents' limitations problem cannot be evaded by this soft euphemism. Here, there can be no doubt that a complaint based on the Trust's failure to give notice in 1969 and/or its 1973 determination would be time barred. If the Court of Appeals' decision did not depend on a finding that one of the acts was illegal, there was no basis for its conclusion that the 1986 denial was not "otherwise lawful." *Machinists*, 362 U.S. at 417.[5]

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[5] Finally, Respondents suggest that this case was "correctly decided" because "[t]he Trust's 1986 determination that Rodriguez had forever waived his rights to exercise the option contained in the Plan Document by not challenging the Killough letter in 1973 was the most significant possible 'act' of the Trust under § 514(b)(1), and was made post-ERISA." Resp. Br. 17. The short answer to this contention is the same as to Respondents' other points—the rationale now provided by Respondents is not the

III. The Questions Presented Are Important

It bears emphasis that Respondents do not deny that the questions presented in the Petition are important to private pension plans which are covered by ERISA. See Pet. 13-14, 17-18.

IV. The Petition For Certiorari In No. 88-3012

There is presently pending before this Court a Petition for Certiorari, filed shortly before the Petition herein, in *Lamontagne* v. *Pension Plan of the United Wire, Metal & Machine Pension Fund, et al.*, which seeks review of the Second Circuit's decision (of the same title) reported at 869 F.2d 153 (2d Cir. 1989). In that decision, the Second Circuit followed *Menhorn*'s holding "that a district court lacks subject matter jurisdiction over a pension applicant's claim that his employer violated the fiduciary standards section of ERISA by denying his application, when the denial was merely the 'inexorable consequence' of pre-1975 events. 738 F.2d at 1502." 869 F.2d at 156.[6] Accordingly, the Court affirmed dismissal of *Lamontagne*'s post-ERISA claim that the denial of benefits to him, based on a break-in-service rule established prior to ERISA, violated ERISA's fiduciary standards. In No. 88-2012, the claimant seeks review of that holding. He asserts, *inter alia*, a conflict with the decision of the Fourth Circuit herein.[7]

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rationale offered by the Court of Appeals. The Fourth Circuit did not conclude that the Trust's decision was arbitrary or not in accord with Trust regulations, nor did it dispute the District Court's conclusion that Rodriguez' failure for twelve years (from receipt of the Trust's 1973 decision until the filing of his pension application in 1985) to inform the Trust that he had not exercised his option because he had never been informed of it was an attempt by him "to have his cake and eat it too," which provided the Trustees with "a rational and sound basis" for denying him relief.

[6] Candor compels us to acknowledge that we overlooked the *Lamontagne* decision at the time of filing the Petition herein.

[7] The question there presented reads as follows:

> Whether ERISA's fiduciary standards, which became effective on January 1, 1975, apply to all denials of benefits occur-

This conflict should be resolved now. It is, of course, very much a discretionary matter whether review should be granted in both of two pending cases and, if only one is chosen, which would be the more useful vehicle for the Court. We deem it inappropriate to comment on the grounds stated by the Respondents in No. 88-2012 why review should be denied there, although they do not deny that the decision in *Lamontagne* conflicts with the Fourth Circuit's decision in this case. We do note, however, that No. 88-2012 does not present the statute of limitations issue raised by the second question here. Review in this case would enable this Court to resolve in their entirety the problems arising from post-ERISA claims based on pre-ERISA conduct.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ring on or after that date, as held by the Third, Fourth, and Fifth Circuits, and as maintained by the United States Department of Labor or whether their applicability depends on a case by case analysis of the "significant facts" of each denial, as held by the First, Second, Seventh, Eighth and Ninth Circuits? [Petition for Certiorari, No. 88-2012, p. i.]

[8] See Brief in Opposition to the Petition for a Writ of Certiorari, etc., No. 88-2012 at p. 24, and n.12.